(7)

No. 96-78

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RICHARD E. RAY Petitioner

versus

[illegible], AND THE
[illegible] BOARD OF ELECTIONS Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney representing himself is entitled to an award of fees under 42 U.S.C. Section 1988.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-79

RICHARD B. KAY — Petitioner

versus

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS — Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents, Bremer Ehrler, and the members of the Kentucky State Board of Elections respectfully request that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 900 F.2d 967. The Opinion in its entirety is contained in the petition at Appendix la-lla.

JURISDICTION

Petitioner relies on 28 U.S.C. Section 1254(1) to invoke jurisdiction.

STATUTE INVOLVED

42 U.S.C. Section 1988, as amended by the 1976 Civil Rights Attorney's Fees Awards Act, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner, representing himself, filed his original complaint in the United States District Court for the Eastern District of Kentucky in January of 1988. Concurrent with filing the complaint, petitioner filed a motion for a temporary restraining order and/or preliminary injunction challenging the constitutionality of Ky. Rev. Stat. Section 118.581 and Ky. Rev. Stat. Section 118.611 and requested that his name be placed on the ballot for the Kentucky May primary election as a candidate for President of the United States. The original complaint alleged that the Kentucky presidential preference primary election laws which required that the State Board of Elections shall caused to be placed upon the ballot only those "generally advocated and nationally recognized" presidential candidates. The Kentucky State Board of Elections had previously decided that those persons who had received

Federal Election Committee certification for matching funds shall fulfill the statutory standard. The petitioner did not so qualify and was advised by the Kentucky State Board of Elections that he would not be nominated to the ballot and certified by the Board. Immediately thereafter, petitioner filed this action, alleging in the original complaint that the actions of the Secretary of State and the State Board of Elections were violative of his rights under the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; 42 U.S.C. Sections 1981, 1983, 1988, et seq; 42 U.S.C. Section 1973; and 28 U.S.C. Sections 1331 and 1343.

In 1980, petitioner had brought suit in Kentucky challenging the validity of what was then essentially the same statute as was questioned in the present litigation, and as a result his name was placed upon the 1980 presidential election ballot in Kentucky.

Kay v. Mills, 490 F.Supp. 844 (E.D. Ky. 1980). In 1982, the Kentucky General Assembly repealed this statute, Ky. Rev. Stat. Section 118.580. In 1986, the Kentucky General Assembly, enacted Ky. Rev. Stat. Section 118.581, which is the subject of the present challenge. In January 1988, the Kentucky State Board of Elections, without knowledge of the suit filed at that time, and upon knowledge of petitioner's previous candidacy voted to place Kay's name on the presidential preference primary ballot. By the action taken by the Kentucky State Board of Elections, petitioner's request for a temporary restraining order and preliminary injunction were rendered moot. However, upon the adoption of the Magistrate's Report and Recommendation as same appears at 19a of the Appendix filed by petitioner, and by adoption of it by the District Court, as same appears at page 18a of the Appendix filed by petitioner, the District Court declared the provisions of Ky. Rev. Stat.

Section 118.581 and Ky. Rev. Stat. Section 118.611 unconstitutional. The court found that the statutes did not contain a reasonable criteria by which candidates could measure their qualifications for being an independent presidential candidate, and that the requirement imposed by Ky. Rev. Stat. Section 118.611, which, in essence required all candidates to provide a $1,000 deposit with the filing of the petition, but which allows refund of the deposit to candidates of a major political party was violative of the Equal Protection and Due Process Clauses of the Constitution. The District Court held, that the impact of the fee refund system was clearly discriminatory. The net effect was to penalize minority candidates, while allowing majority political party candidates to pay no filing fee.

The only question left unresolved by the District Court decision was the question of the "costs of litigation" and the present question of attorney's fees. The District Court allowed the petitioner to recover his costs of litigation. This issue is addressed at page 27a of the Appendix filed by the petitioner.

The District Court's opinion and the opinion of the Sixth Circuit, affirming the lower court's decision denied an award of attorney fees to petitioner under the rationale from a previous case of the Sixth Circuit which held that a pro se attorney was ineligible for attorney fees in an action under the Freedom of Information Act. 5 U.S.C. Section 552(a)(4)(E). Falcone v. Internal Revenue Service, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984).

Respondents respectively urge that the Court deny petitioner's request for a writ of certiorari in this case. While it is apparent that the several circuits are divided upon the issue of an award of attorney fees pursuant to 42 U.S.C. Section 1988, respondents do not believe that the factual circumstances of this case are such as to warrant a decision of this Court upon the question. Richard Kay is a practicing attorney, residing in and licensed to practice in the State of Florida. He has sought to be a presidential candidate appearing on the Democratic Party primary ballot in Kentucky and many other states. See Kay v. Austin, 621 F.2d 809 (6th Cir. 1980); Kay v. Mills, supra. Respondents urge that the reasoning of the Sixth Circuit, as set forth in Falcone, supra, is particularly applicable to the case and should not be overturned. The very narrow state of

facts in this case is such that it should not lend itself to a wide-sweeping interpretation of a proper award of attorney fees under 42 U.S.C. Section 1988.

It is well settled that in a majority of the circuits that non-attorney plaintiffs who proceed pro se and prevail in civil rights actions cannot recover attorney's fees. 42 U.S.C. Section 1988. Gonzales v. Kangas, 814 F.2d 1411 (9th Cir. 1987); Walje v. City of Winchester, 827 F.2d 10 (6th Cir. 1987). The circuits have split, quite widely, on the question of whether an award of attorney fees is appropriate when the pro se civil rights plaintiff was also an attorney. Perhaps the most prominent case in which the court has found that such an award is proper. Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475 U.S. 1129. Those cases in which the court has denied an award of attorney fees in the most part have been decided in cases

involving the Freedom of Information Act, 5 U.S.C. Section 552(a)(4)(E). Falcone, supra, Aronson v. United States, Dep't of Housing and Urban Dev., 866 F.2d 1 (1st Cir. 1989). The reasoning, as expressed in the case of Falcone, supra, is that 42 U.S.C. Section 1988 presupposes an attorney/client relationship. It is submitted that this is the correct interpretation in that while Falcone, supra, and other cases decided under the Freedom of Information Act, do not involve quite the same issues as cases brought pursuant to 42 U.S.C. Section 1983, that the reasoning of an attorney/client relationship should apply. The intent of an award of fees under 42 U.S.C. Section 1988 should be to compensate litigants for legal costs actually incurred. No such costs are incurred by attorney litigants. The court in Falcone, supra, corectly stated that ". . . [W]e do not believe that Congress intended to so subsidize attorneys without clients." Id. at 648.

It is submitted that petitioner has voluntarily chosen to become a presidential candidate on numerous occasions, and has been precluded from being so, or at least thwarted from being a candidate by the State of Kentucky and others. He has, in effect, created his own client base. Petitioner self-generates his own litigation. Respondents respectfully submit that the lower court has correctly assessed this situation, when, in effect, it concluded that the petitioner has not incurred any expenses for legal representation, and that the only possible loss would had been from the time he might have billed to other clients, assuming there were other clients to be billed. There has been no showing of any actual pecuniary losses in this case at all. Petitioner, by virtue of the decision of the District Court, has been awarded all actual costs of litigation except attorney fees.

Respondents argue that to award petitioner "opportunity costs" would be most inappropriate, particularly upon the factual circumstances of this case. This is not exactly the case in which a successful litigant has been represented by a pro se lawyer representing a person or a class of persons whose situation involves a broad deprivation of civil rights, nor is it a situation involving public interest organizations or other organizations whose in-house counsel brings civil rights actions. The narrowness of the issue and facts involved in this case does not make it a proper one upon which to base a wide reaching interpretation of the award of attorney fees under 42 U.S.C. Section 1988.

In addition to the foregoing reasoning, respondents submit that the bulk of the relief which petitioner sought was obtained with very little effort on his part. It is apparent that once the Kentucky Board of Elections realized

that the candidate was the same candidate who had successfully litigated this same question in 1980, his name was immediately placed on the ballot. Kay v. Mills, supra. The ensuing litigation has basically involved the question of attorneys fees. It is generally well settled that civil right plaintiffs are considered "prevailing" even if at all partially successful, so long as if they are successful on any significant issue in litigation which achieved some of the benefits the party sought in bringing the suit. Plaintiffs may "prevail" even when the benefit sought is achieved through the defendants voluntary compliance if the suit was the "catalyst" that brought about compliance by the defendants. Williams v. Miller, 620 F.2d 199 (8th Cir. 1980), Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), Hanrahan v. Hampton, 446 U.S. 754 (1980). However it is submitted that Kay would have had his name on the ballot had he done nothing at all.

Lastly, respondents' state that an award of fees under 42 U.S.C. Section 1988 is, and always has been, subject to judicial discretion. Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980); Criterion Club v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979). Petitioner's orginal request for a temporary injunction and restraining order was rendered moot by the actions of the Kentucky Board of Elections. All of the results which petitioner originally sought were achieved. As stated previously, the ensuing litigation and appeal has essentially involved only the question of attorney's fees. It is strongly urged that an award of fees in this case would be highly inappropriate, and not at all an action contemplated by 42 U.S.C. Section 1988. It is further submitted that this is the case in which the pro se attorney has become his own best

client. The ruling of the court below, based on its decision in Falcone, supra, is indeed most proper.

Respondent further state that Petitioner should not be awarded attorney fees simply because he had previously litigated the same question in 1980. 42 U.S.C. Section 1988 comtemplates an award of attorney fees as reimbursement for costs actually incurred to a successful civil rights litigant. No where can it be found that attorney fees are to be awarded as penalties or sanctions.

CONCLUSION

The petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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